

REESE LAND COMPANY

IBLA 90-296

Decided June 19, 1996

Appeal from a decision of the Lexington (Kentucky) Field Office, Office of Surface Mining Reclamation and Enforcement that it was not necessary to take enforcement action in response to Reese Land Company's citizen's complaint. Ten-Day Notice No. 89-83-130-13.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints:
Generally—Surface Mining Control and Reclamation Act of 1977: Inspections:
Generally—Surface Mining Control and Reclamation Act of 1977: State Program:
10-Day Notice to State

When, in its response to a 10-day notice, the state permitting authority informs OSM that it has issued cessation orders for the infractions alleged in a citizen's complaint and is actively taking steps to cause the required reclamation to be undertaken, OSM may find the response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1994). Upon such a finding, no further Federal action need be taken.

2. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints:
Generally—Surface Mining Control and Reclamation Act of 1977: Inspections:
Generally—Surface Mining Control and Reclamation Act of 1977: State Program:
10-Day Notice to State

OSM has oversight responsibility to inspect an alleged violation of SMCRA when a state fails either to take appropriate action to correct the violation or to show good cause for failure to do so within 10 days of receipt of notice from OSM. When the state's response, based on its inspection of the site, was that certain of the alleged violations either did not exist, had been abated, or were being abated, and OSM verified the state's findings by inspecting the state agency's files, conducting an on-site inspection accompanied by the complainant, and inspecting aerial photographs showing pre-Act conditions, and declined taking further action, OSM actively exercised its oversight responsibility.

APPEARANCES: Chester L. Reese on behalf of Reese Land Company.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Reese Land Company (Reese) has appealed a February 7, 1990, decision by the Lexington (Kentucky) Field Office, Office of Surface Mining Reclamation and Enforcement (OSM) that it was not necessary to take enforcement action in response to Reese's citizen's complaint.

This matter commenced on May 19, 1988, when Reese filed a written complaint alleging that two coal mining companies had failed to reclaim land belonging to Reese. The alleged failure was described as: "There are thousands of feet of exposed highwalls, hollowfills have not been properly constructed, and black material has been pushed over the hill." On May 24, 1988, OSM advised Reese that it had notified the Kentucky Department of Surface Mining Reclamation and Enforcement (DSMRE) of Reese's complaint by sending that agency a 10-day notice (No. 88-83-130-05) and explained to Reese that DSMRE would either take action or show cause why action need not be taken within 10 days of receipt of OSM's notice.

Documents in the record indicate that when DSMRE received the 10-day notice it inspected the site. One of the operations named by Reese was found to be in violation of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (1994), and 30 CFR 842.12(a), and citations and closure orders had been issued for the violations prior to the inspection. In response to the 10-day notice DSMRE advised OSM that, because all violations found during the inspection had previously been cited, no further action was being taken.

A subsequent telephone record indicates that there was "an Agreed Order on" the company in violation, in which the company agreed to do the necessary reclamation, and that much of the reclamation work had been completed. OSM examined DSMRE's files on June 23 and 24, 1988, and ascertained that the State still held the permits. In its July 1, 1988, report OSM held that "[b]ased on the State's response and the review of the permit packages, all of the citizen's allegations appear to have been satisfactorily addressed. No further action by [OSM] is warranted at this time." Reese was also advised that he had the right to request informal review by the Director, OSM. Reese responded on July 5, 1988, by requesting a Federal inspection, and a field investigation was then conducted. On August 19, 1988, the Lexington Field Office, OSM provided Reese a description of its findings on eight separate points and stated its conclusion that no further OSM action was necessary. No appeal was taken.

On November 6, 1989, OSM received a Congressional inquiry, stating that Reese had asked his Representative to check this ongoing dispute with OSM. The Congressman noted that Reese was of the opinion that OSM should inspect the property and asked OSM to advise him of the situation. This inquiry was forwarded to the Lexington Field Office with a cover letter directing the field office to investigate the matter and issue a 10-day notice if appropriate (i.e., OSM was to proceed as if the congressional inquiry was a citizen's complaint). The Lexington Field Office then contacted Reese by telephone and sought clarification of the nature of his complaint. 1/ On November 28, 1989, Ten-Day Notice No. 89-83-130-13 was issued. In its 10-day notice OSM sought a status report regarding the violations discussed in the August 19, 1988, letter to Reese and newly alleged violations. Reese was advised of the issuance of the second 10-day notice.

In a letter dated December 18, 1989, 2/ DSMRE advised OSM that the violations most recently alleged by Reese had been investigated on May 8, 1989, in response to a citizen's complaint lodged with the State. DSMRE found that the slide described by Reese occurred after the landowner graded out a house site at the toe of a larger, older slide which was well stabilized and showed no other signs of instability. No DSMRE enforcement action was taken as a result of the complaint.

The DSMRE letter then addressed the outstanding violations. 3/ The citations served upon a second coal company had been abated in June of the preceding year. Two additional notices of noncompliance had been served upon the second company since the last OSM inspection. One had been abated and the operator had sought a variance for the other, which was the subject of a technical review at the time of the letter.

OSM then informed Reese that it had issued a 10-day notice, had received a response from DSMRE, and had found that the State had shown good cause for not taking action. Reese was advised that OSM deemed no further action warranted and that if Reese was not satisfied with OSM's decision he should request informal review. On January 11, 1990, OSM received a request for informal review.

1/ A record of the telephone conversation indicates that Reese alleged that six violations he had complained about earlier had not been abated and that a slide had occurred behind the home of another party and an exposed highwall remained. He also alleged the coverup of a number of other violations. The record notes that much of the complaint involved an ongoing civil matter not involving OSM.

2/ This letter is date stamped as having been received by OSM on Dec. 14, 1989.

3/ Some of the violations were then in litigation. A preliminary hearing scheduled for Dec. 6, 1989, had been postponed, and DSMRE had not been notified of a new hearing date.

An inspection and informal review took place on January 18, 1990, with Reese, three OSM inspectors, and three DSMRE inspectors in attendance. The stated reason for the inspection was to conduct a formal review of DSMRE's December 18, 1989, response to Ten-Day Notice No. 89-83-130-13. The inspection commenced with a meeting with DSMRE at DSMRE's Pikesville Regional Office where the outstanding violations were discussed, and a mine site inspection followed.

Four of Reese's concerns were addressed in a written report of the field examination. First, OSM noted ongoing litigation between Reese and one of the permittees regarding property ownership and that it had advised Reese that OSM could not adjudicate property rights. Second, OSM noted that the area of black material deposited on a downslope pointed out by Reese during the site visit was a pre-SMCRA disturbance. OSM further stated that a follow-up examination of 1978 aerial photographs indicated that a large portion of the hollow to be disturbed, and that the area corresponded with a U.S. Geological Survey topographic map showing an old deep mining opening. Third, OSM stated that the exposed highwall was the site of an underground entry for a permitted mine and that Reese had been advised that reclamation was not necessary until after abandonment of the entryway. OSM also stated that it had been informed by DSMRE that the operator had filed a notice of temporary cessation of operations. Fourth, OSM noted that Reese had expressed his satisfaction with DSMRE's finding that the slide behind the residential property was not mining related.

Reese was notified of OSM's findings by a letter dated February 7, 1990. The letter outlined OSM's findings regarding each of the concerns expressed by Reese in his January 11 request and during the January 18 informal review, set out OSM's determination that DSMRE's actions were considered adequate and no further OSM follow-up action was required, and advised Reese of his right to appeal. ^{4/} Reese then filed his appeal.

Reese's statement of reasons for appeal consists of a general statement coupled with specific allegations in the form of margin notes on a copy of OSM's February 7, 1990, letter. His arguments are summarized in the first paragraph of his statement of reasons, which says: "Inclosed is a copy of an inspection dated 1/11/1990 by the Lexington office. As you can see the differences of opinion." His general statement alleges that there are no valid permits for the property and makes accusations of wrongdoing on the part of OSM, DSMRE, and the permittees.

^{4/} OSM incorrectly advised Reese that he had the right to appeal to the Hearings Division of the Office of Hearings and Appeals. When Reese's notice of appeal was received by that office it was forwarded to this Board. Reese and OSM were notified, and Reese's notice of appeal was treated as a notice of appeal to this Board.

A number of arguments are presented when addressing the statements in OSM's February 7, 1990, letter. For example, Reese takes issue with the statement that he "agree[s] with the DSMRE evaluation [of the slide on the residential property] and no longer consider[s] this a basis for concern," stating that he had not agreed with OSM that it was not mining related but had said it wasn't his land. The specific allegations expressed by margin notation are, for the most part, statements of disagreement. No evidence has been submitted in support of his view of the facts, and the record provides no evidence which might support a finding that OSM erred in its analysis of the facts. In addition, there is nothing in either Reese's arguments or the statements made by OSM which would cause us to believe that OSM might have committed an error of law. The only fact that Reese has proven by a preponderance of the evidence is the fact that he holds a strongly different opinion.

Effective May 18, 1982, the Kentucky State regulatory program was conditionally approved by the Secretary. 30 CFR 917.10. On that date, DSMRE was deemed the regulatory authority in Kentucky for all surface coal mining and reclamation operations and for all exploration operations on non-Federal and non-Indian lands. Id. When a state program is approved, that state assumes the responsibility for issuing mining permits and enforcing the provisions of its regulatory program. In Re Surface Mining Regulation Litigation, 627 F.2d 1346 (D.C. Cir. 1980). A state's jurisdiction for enforcement of an approved program is primary, but not exclusive. Shamrock Coal Co. v. OSM, 81 IBLA 374, 376 (1984), appeal dismissed, Civ. No. 84-238 (E.D. Ky. May 13, 1987); Turner Brothers, Inc. v. OSM, 92 IBLA 320 (1986), aff'd, Civ. No. 86-380-C (E.D. Ok. Oct. 5, 1987).

When it received appellant's citizen's complaints and the congressional inquiry, OSM exercised its oversight responsibility under SMCRA by issuing 10-day notices. This action was taken pursuant to section 521(a)(1), 30 U.S.C. § 1271(a)(1) (1994), which provides in part:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If * * * the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring * * *. [Emphasis added.]

[1] When, in its response to a 10-day notice, a state permitting authority informs OSM that it has issued cessation orders for the infractions alleged in a citizen's complaint, and is actively taking steps to cause the required reclamation to be undertaken, OSM may find the response to be appropriate within the meaning of section 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1994). Upon such a finding, no further Federal action need be taken. Mario L. Marcon, 109 IBLA 213, 218 (1989); Turner Brothers, Inc. v. OSM, 99 IBLA 87, 91 (1987).

[2] Throughout the entire period the State had primary responsibility for administering surface coal mining operations on non-Federal land within its borders. Under SMCRA, OSM also had oversight responsibility, including authority pursuant to section 521(a)(1), to inspect an alleged violation of SMCRA when the State failed either to take appropriate action to correct the violation or to show good cause for failure to do so within 10 days of receipt of notice from OSM. See W. E. Carter, 116 IBLA 262, 266-67 (1990); Dora Mining Co. v. OSM, 100 IBLA 300, 302 (1987).

When it received Reese's initial citizen's complaint, OSM properly issued a 10-day notice to the State. The State's response, based on its inspection of the site, was that certain of the alleged violations either did not exist, had been abated, or were being abated. OSM undertook action to verify the existence of the closure orders issued by the State and the continued existence of a permit for the site. When the second 10-day notice was issued and a similar response was made by the State, OSM verified the State's findings by inspecting the files in DSMRE's office, conducting an on-site inspection accompanied by the complainant, and inspecting aerial photographs of the site made in 1978. After this investigation OSM again found no need for further action. The record reveals that OSM actively exercised its oversight responsibility, independently determining whether the permittee had undertaken operations in conformance with the applicable laws and regulations. OSM found that the State had cited the operators for all infractions found by OSM during its site inspection. Some of these infractions had been abated and the citations for the others were being actively pursued. OSM properly declined taking further action after its inspection of the site.

Nor has Reese tendered any evidence that the permittee had not properly abated violations not named in closure orders outstanding at the time of inspection. Thus, we cannot conclude that, with the exception of the cited violations, the operators were in violation of SMCRA and its implementing regulations, such that, in the absence of appropriate State action, OSM was required to take enforcement action to ensure compliance. Therefore, we conclude that OSM properly declined to undertake any further Federal inspection and enforcement action in response to appellant's citizen's complaints.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur in the result:

Franklin D. Amess
Administrative Judge

